FILED
DEC 11 1950

No. 452

United States Court of Appeals

FOR THE SECOND CIRCUIT

OCTOBER TERM, 1950

CHARLES A. KOONS, WALTER E. KOONS, VINCENT MUTI, JACQUES VINMONT, JR., and FRANCIS X. STEPHENS, partners doing business under the firm name of Charles A. Koons & Company,

Petitioners,

against

HONORABLE IRVING R. KAUFMAN,
United States District Judge,

Respondent.

TRANSCRIPT OF RECORD ON PETITION FOR WRIT OF MANDAMUS

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Argued by
WILLIAM H. TIMBERS

United States Court of Appeals

FOR THE SECOND CIRCUIT

OCTOBER TERM, 1950

No.

CHARLES A. KOONS, WALTER E. KOONS, VINCENT MUTI, JACQUES VINMONT, JR., and FRANCIS X. STEPHENS, partners doing business under the firm name of Charles A. Koons & Company,
Petitioners,

against

HONORABLE IRVING R. KAUFMAN,
United States District Judge,
Respondent.

PETITION FOR WRIT OF MANDAMUS AND MOTION FOR LEAVE TO FILE SAME

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July 28, 1950.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

OCTOBER TERM, 1950

CHARLES A. KOONS, WALTER E. KOONS, VINCENT MUTI, JACQUES VINMONT, JR., and FRANCIS X. STEPHENS, partners doing business under the firm name of Charles A. Koons & Company,
Petitioners,

against

HONORABLE IRVING R. KAUFMAN, United States District Judge,
Respondent.

No.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE HONORABLE IRVING R. KAUFMAN, A JUDGE OF THE SAID COURT

SIRS:

PLEASE TAKE NOTICE that at a term for motions of the United States Court of Appeals for the Second Circuit to be held on the 17th floor of the United States Courthouse, Foley Square, New York, N. Y. on October 2, 1950, at 10:30 A. M., or as soon thereafter as counsel may be heard, we shall move the said Court (1) for leave to file the petition for a writ of mandamus hereto annexed; (2) that a writ of mandamus issue to the United States District Court for the Southern District of New York and to the Honorable Irving R. Kaufman, a Judge of the said Court, directing him to vacate and set aside his order of June 29,

1950, as amended by his order of June 30, 1950, transferring an action entitled Charles A. Koons, et al., Plaintiffs, against Henry J. Kaiser, et al., Defendants, Civil Action No. 55-397, from the United States District Court for the Southern District of New York to the United States District Court for the Northern District of California, Southern Division, pursuant to Title 28 of the United States Code, Section 1406(a), on the ground that venue was improperly laid in the United States District Court for the Southern District of New York under Title 28 of the United States Code, Section 1391(a) and (c); and (3) for such other, further and different relief as the Court may deem just and appropriate.

Dated: New York, N. Y., July 28, 1950.

Yours, etc.,

MARK W. NORMAN,
WILLIAM H. TIMBERS,
MORGAN P. AMES,
Attorneys for Petitioners,
1 Atlantic Street,
Stamford, Connecticut.

To:

HONORABLE IRVING R. KAUFMAN,
Judge of the United States District Court
for the Southern District of New York,
United States Courthouse,
Foley Square,
New York, N. Y.

MESSRS. ROSENMAN, GOLDMARK, COLIN & KAYE,
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United States Court of Appeals

FOR THE SECOND CIRCUIT

OCTOBER TERM, 1950

CHARLES A. KOONS, WALTER E. KOONS, VINCENT MUTI, JACQUES VINMONT, JR., and FRANCIS X. STEPHENS, partners doing business under the firm name of Charles A. Koons & Company,
Petitioners,
against
HONORABLE IRVING R. KAUFMAN, United States District Judge,
Respondent.
} No.

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE HONORABLE IRVING R. KAUFMAN, A JUDGE OF THE SAID COURT

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

Your petitioners, CHARLES A. KOONS, WALTER E. KOONS, VINCENT MUTI, JACQUES VINMONT, JR., and FRANCIS X. STEPHENS, partners doing business under the firm name of Charles A. Koons & Company, plaintiffs in the court below, respectfully pray for the issuance of a writ of mandamus to the United States District Court for the Southern District of New York and to the Honorable

Irving R. Kaufman, a Judge of the said Court, directing him to vacate and set aside his order of June 29, 1950, as amended by his order of June 30, 1950, transferring an action entitled Charles A. Koons, et al., Plaintiffs, against Henry J. Kaiser, et al., Defendants, Civil Action No. 55-397, from the United States District Court for the Southern District of New York to the United States District Court for the Northern District of California, Southern Division, pursuant to Title 28 of the United States Code, Section 1406(a), on the ground that venue was improperly laid in the United States District Court for the Southern District of New York under Title 28 of the United States Code, Section 1391(a) and (c), and for such other, further and different relief as this Court may deem just and appropriate.

SUMMARY STATEMENT OF MATTER INVOLVED

This action was commenced on February 10, 1950, by filing in the office of the Clerk of the United States District Court for the Southern District of New York a complaint naming as plaintiffs, CHARLES A. KOONS, WALTER E. KOONS, VINCENT MUTI, JACQUES VINMONT, JR., and FRANCIS X. STEPHENS, partners doing business under the firm name of Charles A. Koons & Company, and as defendants, HENRY J. KAISER, KAISER COLORADO COMPANY and KAISER STEEL CORPORATION (R. 3*).

The partnership, Charles A. Koons & Company, maintains its principal place of business at 620 Fifth Avenue, New York, N. Y. (R. 7).

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*All references in this petition to the record are to printed page numbers of the Transcript of Record as certified by the Clerk of the District Court on July 24, 1950, which Transcript of Record is on file in this Court accompanying this petition.

The individual partners who are members of the said partnership reside as follows (R. 7):

Charles A. Koons — Noroton, Connecticut.
Walter E. Koons — New York, N. Y.
Vincent Muti — Yardley, Pennsylvania.
Jacques Vinmont, Jr., — New York, N. Y.
Francis X. Stephens — New Rochelle, N. Y.

The defendant, Henry J. Kaiser, resides in Oakland, California. The defendant, Kaiser Colorado Company (hereinafter referred to as "Colorado"), is a California corporation, doing business within the Southern District of New York. The defendant, Kaiser Steel Corporation (hereinafter referred to as "Steel"), is a Nevada corporation, doing business within the Southern District of New York (R. 8).

This action was brought to recover the sum of $2,000,000 damages sustained by the plaintiffs as the result of the deceitful action of the defendants who in bad faith violated an agreement of joint venture between the plaintiffs and the defendants, which agreement involved a plan to procure capital for the expansion of Steel, and to procure a market for the products resulting from its expansion, including sales to a company engaged in the distribution of natural gas through the medium of pipe lines to be constructed with the permission of the Federal Power Commission, which company also would furnish additional capital for Steel (R. 7-27). The agreement of joint venture which constitutes the basis of the complaint was negotiated, consummated and performed in New York City (R. 71-72, 77-78, 82-83, 85-93) and most of the witnesses necessary to the trial of the case reside in New York (R. 98).

Personal service of the summons and complaint was made upon the three defendants in New York City on April 11, 1950, by service upon the defendant, Henry J. Kaiser, individually, who also is President of the two corporate defendants (R. 4-6, 37).

By notice of motion dated May 1, 1950, the defendants moved to dismiss on the ground that the corporate defendants were not doing business in New York, or (if the corporate defendants should be found to be doing business in New York) to dismiss the action or transfer it to the United States District Court for the Northern District of California, Southern Division, on the ground that venue had been improperly laid in the Southern District of New York, or (if the corporate defendants were found to be doing business in New York and if venue were found to have been properly laid in the Southern District of New York) to transfer the action to the United States District Court for the Northern District of California, Southern Division, for the convenience of parties and witnesses and in the interest of justice, and (if the action should be dismissed as against either Colorado or Steel or both) to dismiss the balance of the action for lack of indispensable parties (R. 28-30). By an order to show cause dated May 9, 1950, the plaintiffs brought on motions simultaneously with those of the defendants for leave to take depositions upon the jurisdictional issues raised by the defendants' motions and for an adjournment of the defendants' motions until the conclusion of the depositions (R. 67-69).

All of the said motions were brought on and heard by the District Court (Irving R. Kaufman, D. J.) on June 2, 1950, and on June 23, 1950, the opinion of the District Court (Irving R. Kaufman, D. J.) was filed denying the

plaintiffs' motions and granting that branch of the defendants' motions which requested, pursuant to Title 28 of the United States Code, § 1406(a), transfer of the action to the United States District Court for the Northern District of California, Southern Division, on the ground that venue had been improperly laid in the Southern District of New York since neither all of the plaintiffs nor all of the defendants reside within the Southern District of New York as required by Title 28 of the United States Code, § 1391(a) and (c) (R. 104-117). Thereafter an order was entered on June 29, 1950, as amended June 30, 1950, by the District Court (Irving R. Kaufman, D. J.) directing that the action be transferred to the United States District Court for the Northern District of California, Southern Division, during the week of October 16, 1950 "unless there shall be a further order of this Court or of the Court of Appeals for the Second Circuit or the United States Supreme Court staying such direction and transfer or making other disposition of this matter" (R. 118-120).

On July 6, 1950, the plaintiffs filed a notice of appeal to the United States Court of Appeals for the Second Circuit* (R. 121), and a transcript of the entire record in the District Court has been printed and filed in this Court to accompany this petition for a writ of mandamus, as well as the plaintiffs' appeal.

BASIS OF THIS COURT'S JURISDICTION

The order of the District Court sought to be reviewed was dated and entered June 29, 1950, and amended June 30, 1950 (R. 118-120). This petition for a writ of mandamus

*Relying upon *Cohen* v. *Beneficial Loan Corporation*, 337 U. S. 541, 546-547 (1949).

and the petitioners' motion for leave to file the same were filed on July 28, 1950.

The jurisdiction of this Court is invoked pursuant to Title 28 of the United States Code, § 1651(a) (formerly § 262 of the Judicial Code, 28 U. S. C. § 377), as enacted by Public Law 773, 80th Cong., 2d Sess.

The power and jurisdiction of this Court to review the order of the District Court entered June 29, 1950, as amended June 30, 1950, has been sustained by the decision of this Court in the case of *Ford Motor Company* v. *Ryan*, Slip Opinion, pp. 1281-1288 (C. A. 2, 1950).

QUESTION PRESENTED

Should a District Court, in an action brought by a partnership based upon diversity of citizenship where the individual members of the partnership are named as plaintiffs to show proper diversity of citizenship, look to the places of residence of the individual partners rather than to the principal place of business of the partnership in determining whether there has been compliance with the venue requirements of Title 28 of the United States Code, § 1391(a), requiring that in a civil action based upon diversity of citizenship all plaintiffs or all defendants must reside in the district where suit is brought?

[*The District Court below construed Title 28 of the Judicial Code, § 1391(a), to mean that the places of residence of the indivdiual members of a partnership are controlling for venue purposes, rather than the principal place of business of the partnership (R. 109-113).*]

REASONS FOR ISSUANCE OF THE WRIT

1. Application of the venue provisions of § 1391(a) to actions involving partnerships and individual members of partnerships as parties involves questions of wide general importance in the administration of Federal justice under the Judicial Code—far exceeding the importance even of the issues of this particular case.

2. The construction placed by the District Court below upon § 1391(a) is a novel construction never before placed by any court on § 1391(a), so far as we have been able to discover. Unless an authoritative construction of this statute, in its application to members of partnerships as parties, can be obtained by issuance of the writ of mandamus herein requested, the purpose of Congress in the enactment of this section may largely be frustrated as a result of the precedent created by the opinion of the District Court below.

3. The decision by the District Court below is in conflict with a decision by the District Court for the Eastern District of Pennsylvania in the case of *Darby* v. *Philadelphia Transportation Company*, 73 F. Supp. 522 (E. D. Pa. 1947, Ganey, D. J.) where, in a carefully reasoned opinion, that court held that the requirements of the federal venue statute had been complied with since venue had been laid where the defendant partnership had its principal place of business even though the individual partners were citizens of different States.

4. The District Court below refused to follow the analogous reasoning of Judge Learned Hand in the case of *Sperry Products, Inc.* v. *Association of American Rail-*

roads, 132 F. (2d) 408 (C. C. A. 2d, 1942), where this Court held that an unincorporated association was a jural entity with reference to venue and, accordingly, the requirements of the federal venue statute were satisfied if venue were laid where the principal activities of the unincorporated association took place; this Court there permitted suit in the district of the unincorporated association's principal office or place of business. While the District Court below flatly refused to follow the analogy between the instant case involving a partnership and the unincorporated association cases (R. 111), Professor James William Moore, the distinguished Special Consultant to the Revision Staff which revised Title 28 of the United States Code relating to the Judiciary and Judicial Procedure, has stated in 3 Moore's Federal Practice (2d Ed.), page 1416:

> "While the *Sperry Products* case dealt with an unincorporated association and not a partnership, it should be followed with regard to partnerships as well. As we have seen, the analogy to corporations drawn by the court in the *Sutherland* case is entirely unworkable as applied to a partnership having members who are citizens of more than one state. A workable alternative is the 'principal place of business' test used in the *Sperry* case, and this has been adopted" (citing the *Darby* case, *supra*).

The District Court below relied heavily upon the *Sutherland* case (R. 110), referred to by Professor Moore, *supra,* as "entirely unworkable as applied to a partnership having members who are citizens of more than one State."

5. The decision by the District Court below is in conflict with the changing legal concept of a partnership from that which obtained at common law to the concept of a part-

nership as a jural entity for venue purposes. Specifically, in attempting to carry out the mandate of Rule 17(b) of the Federal Rules of Civil Procedure which requires a district court to determine by the law of the State in which the court is held the capacity of a party to sue or be sued, the District Court below erroneously held that under New York law a partnership is not a jural entity separate from its individual partners (R. 113). This holding is squarely in conflict with § 222(a) of the New York Civil Practice Act, with the provisions of the Uniform Partnership Act (which is in force in New York as the New York Partnership Law) and with the decisional law of New York which recognizes a partnership as a separate jural entity.

6. To paraphrase the language of this Court in *Ford Motor Company* v. *Ryan,* Slip Opinion, pp. 1281-1288 (C. A. 2, 1950), this is "* * * the kind of interlocutory order with which this court can properly deal by way of such a writ, since, should petitioners—the [plaintiffs]—lose below, any error in the interlocutory order would probably be incorrectible on appeal, since petitioners could hardly show that a different result would have been reached had the suit [not] been transferred. Nor, should petitioners win on the merits below, could they collect as costs the additional expenses to them, if any, due to the court's [order of transfer]. * * *"

7. The error by the District Court below which we respectfully request this Court to correct by the issuance of a writ of mandamus is not merely an error in the exercise of conceded judicial power; it is an error consisting of the usurpation of power by the District Court. Since the order of transfer was beyond the power conferred upon the

District Court and the District Court had no power to do what it purported to do, no subsequent decision on the merits can redress the injury inflicted upon the petitioners by this order.

8. The hardship which would be imposed upon the petitioners by a long postponed appellate review of the erroneous order of transfer entered by the District Court, coupled with the attendant infringement by the District Court upon the policy of Congress conferring upon plaintiffs, including the petitioners herein, the valuable venue-privilege of selecting the forum in which to bring suit, together support the instant petition directed to the discretion of this Court to exercise its power to review the order of the District Court in advance of final judgment, to the end that the District Court may be confined to the exercise of its prescribed jurisdiction.

PRAYER

For the reasons outlined above, developed more in detail in the accompanying brief, your petitioners pray that a writ of mandamus issue out of this Court to the United States District Court for the Southern District of New York and to the Honorable Irving R. Kaufman, a Judge of the said Court, and that the duly certified copy of the transcript of the proceedings below which accompanies this petition shall be treated as though filed in response to the aforesaid writ, to the end that this cause may be reviewed and determined by this Court; that the order of the District Court may be reversed, vacated and set aside; and that your petitioners may be granted such other, further

and different relief as this Court may deem just and appropriate.

Dated: New York, N. Y., July 28, 1950.

MARK W. NORMAN,
WILLIAM H. TIMBERS,
MORGAN P. AMES,
Attorneys for Petitioners,
1 Atlantic Street,
Stamford, Connecticut.

CUMMINGS & LOCKWOOD,
Stamford, Connecticut,
Of Counsel.

Endorsement

Petition for mandamus denied on authority of *Magnetic Engineering and Manufacturing Company* v. *Dings Manufacturing Co.*, 178 Fed. (2) 866 (C. A. 2).

L. H.
T. W. S.
C.JJ.

Oct. 6, 1950

Order on Petition

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 6th day of October, one thousand nine hundred and fifty.

Present:

Hon. LEARNED HAND,
Chief Judge,
Hon. THOMAS W. SWAN,
Hon. CHARLES E. CLARK,
Circuit Judges.

CHARLES A. KOONS, *et al.*,
Petitioners,

against

HONORABLE IRVING R. KAUFMAN, *U. S. D. J.*,
Respondent.

A petition for a writ of mandamus having been filed herein by counsel for petitioners and argument having been had thereon,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied on authority of Magnetic Engineering & Manufacturing Company v. Dings Manufacturing Co., 178 Fed. (2d) 866 (C. A. 2).

ALEXANDER M. BELL
Clerk.

Motion to Amend Order

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
OCTOBER TERM, 1950

[SAME TITLE]

Upon the annexed affidavit of William H. Timbers, sworn to October 21, 1950, and upon all papers heretofore filed and all proceedings heretofore had herein, the petitioners move, in the event their petition for rehearing in this Court is denied and only in that event, that the order of this Court entered on October 6, 1950, in the above entitled cause which reads

> "PETITION FOR MANDAMUS DENIED ON AUTHORITY OF MAGNETIC ENGINEERING & MANUFACTURING CO. v. DINGS MANUFACTURING CO. 178 Fed (2) 866 (C. A. 2)
>
> L.H.
> T.W.S.
> C.JJ."
>
> Oct. 6, 1950

be amended by adding the following:

> "And the Clerk of this Court is directed, upon application by counsel for the petitioners, to certify and transfer to the Court of Appeals for the Ninth Circuit three copies of (1) the complete record, including proceedings in this Court, (2) the petition for

mandamus, (3) all briefs filed in this Court, and (4) opinion of this Court in the *Magnetic Engineering* case, in order to facilitate bringing this matter before the Court of Appeals for the Ninth Circuit and to save the cost of reprinting in that Court the papers which were printed in this Court.

Dated: Stamford, Connecticut, October 21, 1950.

WM. H. TIMBERS
WILLIAM H. TIMBERS
Attorney for Petitioners
1 Atlantic Street
Stamford, Connecticut